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Supreme Court, U.S.
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No. 88-1764

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MONTE LEE POST, Petitioner,

v.

LUIS GARCIA,

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT,

and the

ATTORNEY GENERAL OF THE STATE OF
CALIFORNIA, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

==========

REPLY TO BRIEF IN OPPOSITION

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(PETITIONER IN PRO SE)

QUESTIONS PRESENTED

Petitioner hereby reiterates those questions presented in his initial petition, and herein adds the following question.

1. Whether a motion to recall the remittitur followed by a petition for review to the state's highest court is sufficient to exhaust federal claims in the California state courts when such remedy is available by statute; and when the state courts could have treated such applications as a petition for writ of habeas corpus, but instead, chose to ignore the federal constitutional issues and claims contained therein; and when all the legal and factual basis of a federal petitioner's petition for writ of habeas corpus in the district court was the same as those presented to the state's highest court in the above stated applications?

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OPINIONS BELOW

The opinions and judgments from the courts below, are as noted on p. 38 of the Petition for Writ of Certiorari and contained in the appendices thereof.

JURISDICTION

Jurisdiction of this Court has not been disputed.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

The Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations, are as stated on pp. 4-6 of the petition.

STATEMENT OF THE CASE

The Statement of the Case is as noted in the petition and the Respondent's Brief in Opposition, along with the following additional information.

Petitioner did not appeal the superior court's summary denial of Petitioner's state Petition for Writ of

Habeas Corpus because pursuant to California Penal Code, section 1506, only the **People** have the right of appeal from an order of the superior court on a petition for writ of habeas corpus.

Instead, Petitioner chose the Motion to Recall the Remittitur, pursuant to California Rules of Court, Rule 25(d), which was a viable procedure to have the appeal reinstated per the California Supreme Court's own case law. See In re Smith, 3 Cal.3d 192, 203, 204 [90 Cal.Rptr. 1, 474 P.2d 969] (1970), where the California Supreme Court ordered the appeal reinstated because one of the issues was the denial of effective assistance of counsel on appeal.

There were no **specific instructions** that Petitioner could only exhaust state remedies by way of habeas corpus. (Brief of Resp. in Opp., pp. 2, 17, 18, 28, 37, 38; Pet., App. C, pp. 60-62).

ARGUMENT IN REPLY TO RESPONDENT'S BRIEF

1. Petitioner has fully and fairly presented his federal constitutional claims to the state's highest court in his motion to recall the remittitur and petition for review thereon.

A motion to recall the remittitur is a viable means of state exhaustion where ineffective counsel on appeal is at issue. In re Smith, 3 Cal.3d 192, 203-204 [90 Cal.Rptr. 1, 474 P.2d 969] (1970); Hayward v. Stone, 496 F.2d 844, 845-846; Calif. Rules of Court, Rule 25(d). An issue, which the Respondent has in fact conceded. (Brief of Resp. in Opp., pp. 30-31). Petitioner's motion to recall the remittitur presented not only the issue of ineffective counsel on appeal, but also the denial of a trial by jury, which is a denial of a fundamental federal right, and not just an error of law, as the Respondent wishes to have

this Court decide. (Brief of Resp. in Opp., pp. 30-31); (Post v. Garcia, et al., 9th Cir. No. 87-5879, Request for Cert. Prob. Cause, Exhibit "X").

Furthermore, Petitioner's motion to recall the remittitur could have been treated as a petition for writ of habeas corpus by the state courts. People v. Mutch, 4 Cal.3d 389, 396-397 [93 Cal. Rptr. 721, 482 P.2d 633] (1971).

Respondent now argues that the state courts should be given the opportunity to review Petitioner's federal claims in light of Rose v. Clark, 478 U.S. 570 [92 L.Ed.2d 460, 106 S.Ct. 3101] (1986), (Brief of Resp. in Opp., p. 27), when in fact, the state courts had all the necessary facts, substance, issues, or whatever else the state's highest court needed to apply controlling legal principles to Petitioner's federal claims in Petitioner's motion to recall the

remittitur and petition for review.

However, the state courts chose not to treat Petitioner's motion to recall the remittitur as a petition for writ of habeas corpus and decide those issues. (Pet., App. C, pp. 52-53). People v. Mutch, supra at 4 Cal.3d 396-397. Nor has the Respondent offered any explaination of why the state courts chose to ignore Petitioner's federal claims fully and fairly presented to them in Petitioner's motion to recall the remittitur and petition for review to the state's highest court. Smith v. Digmon, 434 U.S. 332, 333-334 [54 L.Ed.2d 582, 98 S.Ct. 597] (1978).

Moreover, by not giving Petitioner an opportunity to vindicate his federal claims, the lower federal and state courts' have effectively relieved the state of its' burden of proof as the beneficiary of those claims. Chapman v.

California, 386 U.S. 18, 23-24, 43 [17 L.Ed.2d 705, 87 S.Ct. 824] (1967), reh. den. 386 U.S. 987; Henry v. Mississippi, 379 U.S. 443, 447-448 [13 L.Ed.2d 408, 85 S.Ct. 564] (1965), reh.den. 380 U.S. 926; Humphrey v. Cady, 405 U.S. 504, 516 fn18, 517 [31 L.Ed.2d 394, 92 S.Ct. 1048] (1972); Sanders v. U.S., 373 U.S. 1, 8 [10 L.Ed.2d 148, 83 S.Ct. 1068] (1963); Smith v. Digmon, supra at 434 U.S. 333-334; Townsend v. Sain, 372 U.S. 293, 312-314, 316 [9 L.Ed.2d 770, 83 S.Ct. 745] (1963); Young v. Ragen, 337 U.S. 235, 238-239 [93 L.Ed. 1333] (1949); Sixth & Fourteenth Amendments to the United States Constitution.

Therefore, because the state was the beneficiary of Petitioner's federal claims; and because Petitioner has fully and fairly presented those claims to the state's highest court, certiorari should be granted.

2. Respondent now seeks this Court to further deny Petitioner any opportunity to vindicate his federal constitutional claims.

Respondent acknowledges that Petitioner's defense of unconsciousness was an affirmative defense. (Brief of Resp. in Opp., p. 43.).

However, Respondent's only explanation as to why such defense was precluded from the jury's consideration in Petitioner's trial, is that in effect the California Constitution, Article VI, section 10 and the California Penal Code, section 1127, permits a California trial judge to effectively direct a verdict of guilty against a criminal defendant by denying a requested defense instruction.

This contention should in itself, be sufficient grounds for this Court to grant certiorari to determine whether a California trial judge can use the

California constitution and penal code to effectively circumvent the fundamental right to a trial by jury as afforded by the Sixth Amendment to the United States Constitution. Particularly when Respondent now argues that the issue of the denial of a right to trial by jury is not a federal question. (Brief of Resp. in Opp., pp. 42-44). And more particularly where the following authorities show the contrary. Corpus Juris Secundum, Vol. 23A, XV, sections, 1118, 1120, 1128, 1131, 1138, 1139, 1146, 1155, 1158, 1171; Straus v. U.S., 376 F.2d 416, 419 (5th Cir. 1967); U.S. v. Spock, 416 F.2d 165, 180-181 (1st Cir. 1969); Zemina v. Solem, 438 F.Supp. 455, 467-470 (D.C. S.D. 1977), aff'd. 573 F.2d 1027 (8th Cir. 1978); U.S. v. Martin, 704 F.2d 267, 271 (6th Cir. 1983); Rose v. Clark, supra at 478 U.S. 578; United Brotherhood v. U.S., 330 U.S. 395, 408-409 [91

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Therefore, certiorari should be granted in order to make those determinations.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

DATED: July 22, 1989

Respectfully submitted.

/s/
Monte Lee Post, Petitioner
(In pro se)

PROOF OF SERVICE BY MAIL

[Supreme Court Rule 28]

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE:

I am a resident of the aforesaid county; I am over the age of eighteen years and I am not a party to the within entitled action; my business address is:

P.O. Box 2122, Cathedral City, California 92235-2122.

On July 24, 1989, I served the within,

REPLY TO RESPONDENTS BRIEF IN OPPOSITION

on the interested parties or their attorney of record in said action, by placing three true copies thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid, in the United States mail at Palm Springs, California, addressed as shown on the following page:

SEE LIST ON ATTACHED PAGE

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on July 24, 1989, at Cathedral City, Calif.

/s/
Signature, Barbara P. Post

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